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Restoring the Lost Constitution, Not the Constitution in Exile

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RESTORING THE LOST CONSTITUTION, NOT THE CONSTITUTION IN EXILE

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Let me begin by saying a few words about the so-called "Constitution in exile." I have been very vocal in denying the existence of a "Constitution in exile movement" ever since this meme reared its head in *The New York Times*. Libertarians and conservatives do not talk about a "Constitution in exile." Indeed, nobody did until Cass Sunstein and Jeffrey Rosen published their "exposés" of this alleged movement,[1] the name for which they appropriated from a passing reference in a speech by Doug Ginsburg.[2]

But, given that the title of my book is *Restoring the Lost Constitution*,[3] it is fair to ask, what difference there is, if any, between restoring a "Constitution in exile" and restoring a "lost Constitution"? Of course, depending on how these labels are defined, there does not have to be any difference. My objection to Sunstein and Rosen's reference to a Constitution in exile movement is to their claim that there is a desire to return to a set of pre-1937 *results* and to restore constitutional *law* or doctrine as it existed at some point before 1937, or 1941 (they vary on which point they identify).

The lost Constitution that I discuss in my book is not, however, about restoring a particular set of preexisting results or body of constitutional law doctrines from before 1937. Some of these results and doctrines I like, others I dislike. I also much prefer some post-1937 results and doctrines. What *Restoring the Lost Constitution* is really about is restoring various "lost clauses" that have gradually been removed from the Constitution by misinterpretation over a very long period of time.

The Constitution we have now is redacted. Any practicing lawyer will tell you that you cannot go into court and argue the Ninth Amendment. You cannot go into court and argue the Privileges or Immunities Clause.

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1. *See* Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America (2005); Jeffrey Rosen, *The Unregulated Offensive*, N.Y. Times, Apr. 17, 2005, § 6 (Magazine), at 42.

2. *See* Douglas H. Ginsburg, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, B. Kenneth Simon Lecture in Constitutional Thought at the Cato Institute (Sept. 17, 2002), *in On Constitutionalism*, 2002-2003 Cato Sup. Ct. Rev. 7.

3. Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004).

Until *United States v. Lopez*[4] you could not argue the Commerce Clause; after *Gonzales v. Raich*,[5] it is not clear you can argue the Commerce Clause anymore. You cannot argue the Necessary and Proper Clause. You cannot argue the Republican Guarantee Clause. You cannot argue the Second Amendment outside the Fifth Circuit.

Whole sections of the Constitution are now gone. This is the lost Constitution. It is not a set of pre-1937 results; it is a set of post-1789 provisions of the Constitution that are, for all practical purposes, dead letters. Identifying the original meaning of these lost clauses and how their restoration would affect the Constitution as a whole is what *Restoring the Lost Constitution* is about. However it is labelled, this is a substantially different project than the one that is characterized—mischaracterized—as the Constitution in exile movement.

It is a great privilege to be on a panel with Sotirios Barber. Barber contributed an important paper to the "Symposium on Interpreting the Ninth Amendment" that I organized for the *Chicago-Kent Law Review* when I was just beginning my scholarly transition to constitutional law.[6] It is a particular delight to be asked to comment on his new book, *Welfare and the Constitution*,[7] an important work of political constitutional theory. I was struck when I read it by the degree to which he and I are in agreement over some very fundamental issues. The issues on which we agree are matters of principle, and where we disagree, it is largely on how those principles should be applied in the real world of human social life.

Perhaps our most important area of agreement is what Barber calls "the instrumental Constitution."[8] As he states the position, "The Constitution charters a set of institutions for pursuing a set of benefits in a manner consistent with the principles of those institutions and a set of rights."[9] The end to which the Constitution is instrumental can be called the general welfare. He writes, "My thesis is that the Constitution is an instrument of the general welfare . . . ."[10] And then, as he elaborates, "[t]he general welfare promised by the Constitution must be seen as an end whose meaning does not depend on the constitutional scheme established to promote it."[11]

Instead, the general welfare is a standard by which this or any other Constitution should be judged: "[T]he Constitution deserves the allegiance of its people only under certain conditions. It does not compete with scientific or nonmoral propositions regarding how the public feels, the

4. 514 U.S. 549 (1995).
5. 125 S. Ct. 2195 (2005).
6. *See* Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 Chi-Kent L. Rev. 67 (1988).
7. Sotirios A. Barber, Welfare & the Constitution (2003).
8. *Id.* at 92-117.
9. *Id.* at 92 (emphasis omitted).
10. *Id.* at 100.
11. *Id.* at 98.

causes of obedience, or the conditions under which people generally are likely to accept constitutional authority."[12] I agree with all of this. Or, as he puts the matter in other words, "[t]he Constitution, by its language and the object lesson of its founding, claims the fidelity of the population only in terms of the benefits it facilitates."[13]

Accordingly, I also share Barber's conception of the general welfare: "[T]he general welfare is in principle the welfare of each responsible person in the community."[14] In this regard, the general welfare is genuinely *general* insofar as it concerns the welfare of each person. I share Barber's rejection of so-called "welfarist" conceptions of the general welfare that focus on the aggregate welfare of the community. As Barber puts it, "As for the general welfare as the welfare of each, this assumption will be opposed by social Darwinists and preference utilitarians."[15]

Further, I agree with him that welfare is an objective, not a subjective, notion. Along with Barber, "I assume that the general welfare has objective content about which people can err, that it embraces the well-being of every responsible person, and that its intrinsic desirability supplies a reason to believe that people will desire it under optimal conditions."[16]

Finally, it is important to stress one additional area of our agreement. In Barber's words,

> As an end of government 'the general welfare' is not to be confused with specific state provisions of the kind currently associated with the 'welfare state.' The latter are at best means to the former. . . . Specific state provisions enacted in good faith can also fail, of course, by bringing unwanted consequences, like dependency.[17]

Put another way, one can view the Constitution instrumentally and its end as the general welfare while disagreeing about the merits of particular government so-called welfare policies, in particular, or the merits of government welfare policies, in general.

These areas of agreement are extremely significant. First, the position we share rejects a consequentialism based on a utilitarian maximization of the aggregate welfare of the community. Instead, it is based on a genuinely general welfare—or what used to be called the "common good"—defined as the welfare of each responsible person or the good that all persons share in common. Second, we both reject basing the legitimacy of the Constitution on the consent of the governed in any literal sense. Instead, legitimacy is based on the merits of the institutions established by the Constitution and whether the commands of these institutions are entitled to a prima facie duty of obedience. Third, we both reject a notion of

12. *Id.* at 94.
13. *Id.* at 154.
14. *Id.* at 104.
15. *Id.* at 104.
16. *Id.* at 106.
17. *Id.* at 96.

legitimacy based on the degree of actual acceptance by the population. Instead, legitimacy is based on whether the institutions established by the Constitution ought to be accepted; and, if so, the commands of those institutions are binding even upon those who do not consent to them.

Given the substantial degree of theoretical agreement, on what do we disagree? First, we differ on the role that liberty rights play in the pursuit of the general welfare. Second, we differ on the role that a written constitution plays in protecting these liberty rights. Third, we differ on the proper interpretation of the U.S. Constitution. In the remainder of my remarks, I will not identify or defend my stances on these three issues, which are the subject of lengthy discussion in *Restoring the Lost Constitution*. Instead, I will confine myself to explaining why I think we disagree about liberty rights.

To begin with, I reject the whole idea of negative rights, negative liberty. I am not a negative guy; I am a positive guy. I like liberty, so forget this negative stuff. That was Isaiah Berlin's idea.[18] We're not bound by that. So I am for liberty and liberty rights; liberty is a good thing, and I think liberties are positive. (In this regard, I think I agree with Barber about his basic conceptual opposition to so-called "negative" liberties.)

But the argument in my book, *The Structure of Liberty*,[19] is that liberty, as defined by the particular liberty rights I defend there, is essential to solving three pervasive categories of social problems that every society must solve somehow. These are problems of knowledge, problems of interest, and problems of power. In that book, I explain how these particular liberty rights are essential to solving the three categories of social problems. Everybody, every human being, has a stake in their solution. If it is correct that these rights are the solutions to those social problems, then everybody has a stake in these particular liberty rights.

But some may then ask: Can we better serve the general welfare by qualifying or supplementing these rights in some way, perhaps by recognizing welfare rights in addition to liberty rights? My argument against the kind of welfare rights or welfare policies that Barber would favor is that, for a variety of reasons related to the imperative for why these liberty rights are so essential to the common good, trying to pursue these other welfare policies by means that themselves violate liberty rights is likely to be counterproductive. In other words, qualifying or supplementing these rights is not likely to achieve the general welfare, is not likely to contribute to the general welfare, and is likely to inhibit or retard the general welfare.

I reject the distinction Barber makes between negative constitutionalism and affirmative constitutionalism, because I think, in some sense, it distorts the terms of the debate. As he defines it, I too would reject the "negative constitutionalism" that Barber rejects. Was *DeShaney v. Winnebago*

18. *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* Four Essays on Liberty 118 (1969).
19. Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law (1998).

County[20] wrongly decided as Barber argues in his book?[21] In a Lockean approach to the Constitution and constitutional legitimacy, the first duty of government is the protection of rights. According to Locke, the protection of rights is what justifies the existence of government. In the state of nature, we all protect our own rights. Locke's argument for any government at all is that the state of nature is inconvenient because there are practical problems with people protecting their own rights. What we all need is an independent tribunal of justice, an independent magistrate, who will protect our rights on our behalf (and subject to our control). And so we do not surrender to the state all our natural rights—all the natural rights are still retained by the people. We surrender to the state the executive power to protect our rights. According to this argument, the state has an affirmative duty to protect rights. It is a positive duty and it is the first duty of government. The performance of this duty is the only reason its existence might be justified.

We then arrive at the next question, which Larry Sager posed: Is it a judicially enforceable right or is it a politically enforceable right?[22] That is something about which I really do not have a firm opinion. I think it could easily be a legitimately *constitutional* right that is not judicially enforceable. But if it is not, it is only because it would be very difficult for courts to enforce such a duty, given the fact that the protection of the laws, which I affirm is the first duty of government, is a huge judgment call when it comes to the allocation of resources.

As a former criminal prosecutor, I can tell you that it is very difficult to prosecute everybody, and it is very difficult to catch everybody. Would we then, as a practical matter, hold the taxpayers responsible for paying monetary damages when their agents in government fail to enforce laws adequately? Regardless of how this question is answered, I certainly think it is a positive duty of government to protect our rights, and that many rights that are in the Constitution are "positive" in nature.

For these reasons, I reject "negative constitutionalism" as Barber characterizes it, even while affirming that the only *unenumerated* rights that courts are authorized to protect under the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment are liberty rights. Explaining how we disagree about the role to be played by a written constitution in the protection of liberty rights and why a written constitution should be interpreted according to its original meaning must be left for another day.

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20. 489 U.S. 189 (1989).

21. Barber, *supra* note 7, at 14 ("I regard the chief justice's argument for the Court's action in *DeShaney* . . . a constitutional and strategic mistake . . . .").

22. Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice 84-128 (2004).

Notes & Observations